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CEASE v. New England Aquarium: Standing To Challenge Marine Mammal Permits

Michelle A. Doyle
University of Maine School of Law

CEASE V. NEW ENGLAND AQUARIUM: STANDING TO CHALLENGE MARINE MAMMAL PERMITS

*Michelle A. Doyle**

I. INTRODUCTION

In the recent case *Citizens to End Animal Suffering and Exploitation, Inc.* (CEASE) *v. New England Aquarium*,[1] the United States District Court for the District of Massachusetts prohibited a dolphin and several animal rights groups acting on behalf of the dolphin from bringing suit in federal court.[2] The parties were protesting the transfer of the dolphin (Kama) in a manner alleged to be inconsistent with the permitting requirements of the Marine Mammal Protection Act (MMPA).[3] The court dismissed the case on a motion for summary judgment in favor of the defendants on the basis that none of the named plaintiffs had standing to sue. Although the court summarily dismissed Kama's claim,[4] it

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* University of Maine School of Law, Class of 1996.

1. 836 F. Supp. 45 (D.C. Mass. 1993).

2. The plaintiffs in the case included the organizations themselves (Citizens to End Animal Suffering and Exploitation, Progressive Animal Welfare Society, and Animal Legal Defense Fund) and the individual members of the organizations. *Id.* at 50.

3. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1988) (MMPA). The MMPA aims to protect and conserve marine mammals by imposing limits on the taking and importation of marine mammals for purposes of scientific research, public display, or enhancing the survival or recovery of a species, including the method of transporting mammals after capture. Before any such animal or product can be transported, the Secretary of Commerce must issue an authorizing permit. 16 U.S.C. § 1374 (1988). Kama was transferred pursuant to a "Letter of Agreement" issued to the Navy. Plaintiffs protested this modification of the permitting process by filing this suit. CEASE v. New England Aquarium, 836 F. Supp. at 47.

4. The court found that the dolphin lacked standing to maintain the action as the MMPA "expressly authorized suits brought by persons, not animals." CEASE v. New England Aquarium, 836 F. Supp. at 49. Further, the court would not imply Congressional or Presidential intent to give marine mammals standing without a clear expression of such intent. *Id.* at 50. The court noted that, although the MMPA itself

thoroughly discussed whether or not the plaintiffs' individual members, as individuals, had met the requirement of "injury in fact" necessary for the plaintiffs to have standing. The court concluded that they had not.[5] With less discussion, the court reached the same conclusion regarding the organizational plaintiffs.[6]

The MMPA was passed in 1972 for the purpose of prohibiting the harassing, catching, and killing of marine mammals so that they would continue to be "a significant functioning element in the ecosystem of which they are a part."[7] Essentially, the MMPA gives the Secretaries of the Interior and Commerce the guidance and authority necessary to establish general limitations on the taking of all marine mammals,[8] and within those limits, the power to issue permits that allow the transport of certain marine mammals.[9] The MMPA also requires that the public be informed of the action to be taken and the evidence upon which that decision was reached.[10]

Section 1374 of the MMPA outlines the permit procedures for public display and scientific research of marine mammals.[11] It sets forth requirements for application, public notice and hearing, and permit review.[12] In order to transport a marine mammal an individual or organization must obtain a permit from the Secretary of Commerce.[13] The Secretary of Commerce must publish notice in the *Federal Register* of any application for a permit.[14] This allows interested parties to review permit applications and request a hearing on the matter.[15] The Secretary

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does not state who may bring suit, it refers to the Administrative Procedures Act, 5 U.S.C. §§ 551-559, 701-706 (1994), which explicitly permits only "persons" to bring suit. *Id.* at 50 (quoting 5 U.S.C. § 702). The court also noted that Federal Rule of Civil Procedure 17(b), which discusses the capacity of an individual to sue or be sued, has been held to apply only to human entities. *Id.* at 49. At the request of the defendants, Kama's name was removed from the caption of the case. *Id.* at 50.

5. CEASE v. New England Aquarium, 836 F. Supp. at 50-56. *See infra* part II.
6. *Id.* at 56-58.
7. 16 U.S.C. § 1361(2) (1988).
8. 16 U.S.C. § 1373 (1988).
9. 16 U.S.C. § 1374(a) (1988).
10. 16 U.S.C. § 1374(d) (1988).
11. 16 U.S.C. § 1374(c) (1988).
12. 16 U.S.C. § 1374(d) (1988).
13. 16 U.S.C. § 1374(a)(4) (1988).
14. 16 U.S.C. § 1374(d)(2) (1988).
15. 16 U.S.C. § 1374(d)(4) (1988).

is authorized to conduct a hearing if it is requested.[16] Plaintiffs in this case argued that the Secretary's modification of the required permitting process denied them the right to request a public hearing.[17] The court dismissed this claim without discussing whether a genuine issue of material fact indeed existed. In so doing, the court furthered the government's ability to act without public knowledge, contrary to the explicit provisions of the MMPA.

A permit, once issued, must specify the methods of capture and subsequent care of the marine mammal.[18] An interested party may request judicial review of any permit issued under section 1374 of the MMPA.[19] The legislative history of the Act clearly emphasizes the public's right to information.[20] If the district court had granted plaintiffs standing and had reached the merits of the case, the court would have been unable to reconcile the inconsistencies between the clear mandates of the MMPA and the permit process and the Letter of Agreement that the Secretary utilized in allowing Kama to be transported without a permit.[21]

New England Aquarium acts in conjunction with recent Supreme Court and Circuit Court decisions to close the courtroom doors to environmental groups on grounds of standing.[22] This Note will discuss the ramifications of the *New England Aquarium* decision on the ability of environmental groups to exercise their rights to challenge governmental actions under the MMPA. It will examine the various requirements for standing by tracing several lines of cases, particularly those involving environmental plaintiffs. The Note will then demonstrate that those decisions cannot be reconciled with the court's reasoning in the subject case.

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16. *Id.* While plaintiffs had no assurance that they would receive judicial review of their complaint, they argued that failure to receive notice of the permit was in itself an injury. CEASE v. New England Aquarium, 836 F. Supp. at 55.

17. The Secretary transferred Kama pursuant to a Letter of Agreement, a procedure that provided no public notice. CEASE v. New England Aquarium, 836 F. Supp. at 47-48.

18. 16 U.S.C. § 1374(b)(2)(B), § 1374(c)(1) (1988).

19. 16 U.S.C. § 1374(d)(6) (1988).

20. H.R. CONF. REP. NO. 1488, 92d Cong., 2d Sess. 10-11 (1972).

21. *See supra* text accompanying note 3.

22. *See, e.g.* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Competitive Enterprise Inst. v. National Highway Traffic Safety Admin., 901 F.2d 107 (D.C. Cir. 1990).

II. LEGAL HISTORY

In order to challenge any agency action taken pursuant to the previously outlined sections of the MMPA, the plaintiff must have standing.[23] The test for standing has three requirements. First, the litigant must have suffered an "injury in fact" to a legally-protected interest that is "concrete and individualized, and particularized" and "actual or imminent." Second, there must be a causal connection between the injury and the challenged action of the defendant. Third, the injury must be redressable by a favorable decision.[24]

What is sufficient for "injury in fact" has fluctuated over the years. In *Sierra Club v. Morton*[25] the Supreme Court liberally interpreted the injury in fact requirement. In that case, the court held that injury to "[a]esthetic and environmental well-being" could constitute injury in fact.[26] The Court did require, however, that the injury be to the party seeking review.[27] Thus, if the threatened harm is too far in the future, too vague, or too speculative, that element of standing would not be satisfied. The Supreme Court also discussed the requirement of concrete and individualized injury in *Schlesinger v. Reservists to Stop the War*.[28] The Court held that a plaintiff's status as a citizen by itself was not sufficient to satisfy the "injury in fact" element of standing, because a citizen only has the generalized and abstract interest of all citizens in constitutional governance. It held that a concrete injury is needed to assure that the litigant would present a complete perspective based on a specific set of facts.[29]

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23. Standing satisfies the case-or-controversy requirement of the Constitution. U.S. CONST. art. III, § 2, cl. 2.

24. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted).

25. 405 U.S. 727 (1972). The Sierra Club, an environmental organization, claimed that construction of a recreation area in a national forest would violate federal laws. Under this Court's ruling, people who use national forests have standing. *Id.* at 734.

26. *Id.*

27. *Id.* at 735.

28. 418 U.S. 208 (1974). Plaintiffs sued as "citizens of the United States," claiming that the Incompatibility Clause of Article I, § 6 of the U.S. Constitution was violated by the fact that several congressmen were also members of the Armed Forces Reserve. *Id.* at 208.

29. *Id.* at 221.

An early case defining the requirement of "injury in fact" under the MMPA was *Animal Welfare Institute v. Kreps*.[30] Plaintiff, an animal rights group interested in the health and well-being of seals, challenged waivers issued by the National Marine Fisheries Service (NMFS)[31] which permitted importation of seal skins. Speaking for the court, Judge Skelly Wright found it logical for animal rights groups to defend animals who can't defend their own interests in court, and held that plaintiffs had a legitimate stake in the outcome of the controversy. The simple fact that plaintiffs were on the same footing as the public at large did not mean that plaintiffs did not have standing. The court held that standing does not depend on the size of the harm to the party, and that a killing by a third party was a taking sufficient to cause "injury in fact" to plaintiffs.[32]

Recently, there has been movement away from Judge Wright's liberal construction of the standing requirement toward a narrower interpretation. This trend of narrowing the circumstances under which environmental groups have "injury in fact" to sue was furthered by the Supreme Court's decision in *Lujan v. National Wildlife Federation*.[33] In

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30. 561 F.2d 1002 (D.C. Cir. 1977). This case involved permits allowing importation of sealskins from South Africa. Included among the skins were those from seals less than eight months old or those which were still nursing. *Id.* at 1004. An importation of either type is expressly prohibited by the MMPA. 16 U.S.C. § 1372(b)(2) (1972).

31. The National Marine Fisheries Service (NMFS) has the duty and authority to issue such waivers pursuant to 50 C.F.R. § 216.31 (1988).

32. Animal Welfare Inst. v. Kreps, 561 F.2d at 1007, 1008. The same court declined to follow *Kreps* in Dellums v. United States Nuclear Regulatory Commission, 863 F.2d 968 (D.C. Cir. 1988), distinguishing it on the basis that the parties in *Kreps* were active participants in the controversy and therefore had a specific interest in the outcome of the case, while the *Dellums* parties were not active participants. *Id.* at 973. The plaintiff in *Dellums* was an unemployed African uranium worker who was protesting an importation license for bringing uranium hexafluoride from South Africa to the United States. The court characterized this protest as political as the claim was brought under the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5001-5116 (1988). *Id.* at 973-974. The *Dellums* court dismissed, noting that the Supreme Court had earlier stated that there is no "injury in fact" where the only injury claimed is "widely-held, nonquantifiable, and of political or ideological nature." *Id.* at 972 (*citing* United States v. Richardson, 418 U.S. 166 (1974)).

33. 497 U.S. 871 (1990). Plaintiffs claimed injury caused by mining activities performed by the Bureau of Land Management in the vicinity of an outdoor recreation area. Plaintiffs filed affidavits which indicated use of an unspecified tract of land near where some mining activities had occurred. *Id.* at 875.

that case, the Court refused to overrule the lower court decision that held that the plaintiffs' members' recreational use and aesthetic enjoyment of land in the vicinity of land affected by agency actions was insufficient to show that their interests were actually affected. The Court stated that missing facts could not be presumed to establish an injury which was merely generally alleged.[34] The Court also affirmed the lower court's rejection of the "ecosystem nexus"[35] argument made by plaintiffs in an effort to establish "injury in fact."

The latest case by the Supreme Court in this area is *Lujan v. Defenders of Wildlife*,[36] a decision that further refines and narrows the requirements for standing for environmental plaintiffs. This case involved agency action under the Endangered Species Act[37] which was alleged to threaten marine mammals "in general."[38] The Court stated that the desire to use or observe an animal species, even for purely aesthetic purposes, is a cognizable interest for standing purposes.[39] However, the resultant injury must affect the claimant in a personal and individualized way. Further, the plaintiff must demonstrate imminence of injury in all circumstances.[40] Along with the ecosystem nexus, the Court also

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34. *Id.* at 885-889.

35. The ecosystem nexus would grant standing to plaintiffs who suffered harm anywhere in the natural environment contiguous to that involved in the suit. *Id.*

36. 504 U.S. 555 (1992).

37. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988) (ESA). The ESA requires that federal agencies ensure that their actions are not likely to jeopardize the continued existence of any species listed as endangered or threatened. The agency also may not destroy or modify the habitat of any listed species. 16 U.S.C. § 1536(a)(2) (1988).

38. Plaintiffs, organizations dedicated to wildlife conservation and other environmental causes, challenged a regulation of the Secretary of the Interior which required other agencies to confer with him under the ESA only with respect to federally funded projects in the United States and on the high seas.

39. Lujan v. Defenders of Wildlife, 504 U.S. at 561-562. The Supreme Court first held this in the 1972 case of Sierra Club v. Morton, 405 U.S. 727, 734 (1972); *see also* Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986), where the Court held that an environmental organization had standing because the whale watching and studying of their members would be adversely affected by continued whale harvesting. *Id.* at 230-231 n.4.

40. Lujan v. Defenders of Wildlife, 504 U.S. at 564-566.

rejected the "animal nexus"[41] and the "vocational nexus"[42] tests of directness of injury put forth by the plaintiffs.

As the requirements for "injury in fact" have become more difficult for environmental plaintiffs to meet, such plaintiffs have relied on "informational harm" as a basis for injury in fact. In 1990, the D.C. Circuit decided *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*,[43] holding that plaintiffs have suffered information harm when (1) the information is essential to their activities, (2) the lack of information will render their activities infeasible, and (3) there is a plausible link between the agency's action, the information, and the injury.[44] Thus, informational harm could satisfy the injury in fact prong of the test for standing in some circumstances.[45]

In 1991 the D.C. Circuit revisited informational harm in *Foundation on Economic Trends v. Lyng*.[46] The court noted it could not find any cases where standing had been conferred solely because of informational harm. Informational harm, construed broadly, could be found in every situation; therefore, the court warned against such a broad view, especially where statutes which provide for the dissemination of public information were involved. The court held that such a broad construction was not consistent with the "injury in fact" requirement. It stated

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41. The animal nexus would allow a plaintiff to establish standing based on observation of one or more individuals in a group of animals, not necessarily the specific animal(s) involved in the case. *Id.* at 566.

42. The vocational nexus would confer standing on a plaintiff who works with the species or animal in question, or a plaintiff who works in such a species' habitat. *Id.*

43. 901 F.2d 107 (D.C. Cir. 1990). Plaintiffs were consumer organizations who petitioned for review of orders promulgated by the National Highway Traffic Safety Administration. The orders lowered the minimum fuel economy standards for passenger cars. Plaintiffs claimed that the standards did not adequately reflect safety considerations or the fact that larger and heavier vehicles were safer. *Id.*

44. *Id.* at 122.

45. In fact, the *New England Aquarium* court stated that the plaintiffs in the subject case would be entitled to a trial on the question of whether they have standing via the *Competitive Enterprises* test, if applicable. CEASE v. New England Aquarium, 836 F. Supp. at 57.

46. 943 F.2d 79 (D.C. Cir. 1991). Plaintiffs, a public interest biotechnology group, sued the Department of Agriculture for failure to prepare an environmental impact statement (EIS) in alleged violation of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321-4370(a) (1988) (NEPA). Plaintiffs alleged informational harm as they would be unable to utilize the information an EIS would contain if one was not prepared. *Id.* at 85.

that, beyond the requirements of *Competitive Enterprise*, plaintiffs must show a concrete particularized injury.[47]

Another means of establishing injury in fact is by showing procedural harm. Procedural harm is injury caused when an agency refuses to follow statutorily required procedures.[48] The First Circuit has discussed procedural harm in *Munoz-Mendoza v. Pierce.*[49] In that case, the court indicated that "procedural errors" were a basis for judicial review under the Administrative Procedure Act[50]—as well as a part of the universal practice of judicial review.[51] The First Circuit looked at the underlying purpose of the National Environmental Policy Act[52] and determined that procedural harm can constitute a real injury.[53] The Supreme Court has also indicated that procedural harm is a legitimate cause of "injury in fact." The Court in *Defenders of Wildlife* stated, "[w]e do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing."[54]

The *New England Aquarium* court further narrowed the injury in fact element of standing by requiring that an informationally harmed plaintiff first suffer procedural harm in order to have an "injury in fact."[55] In doing so, the court made the failure to inform the public insufficient grounds for suit. This holding is in conflict with one of the intents of the MMPA—that the public should be informed of takings and handling

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47. *Id.* at 86-87.

48. United States v. AVX Corp., 962 F.2d 108, 118 (1st Cir. 1992).

49. 711 F.2d 421 (1st Cir. 1983). Minority residents of Boston brought action challenging the decision of the Department of Housing and Urban Development to grant money to the city to develop a commercial complex. Plaintiffs' standing was challenged. *Id.* at 422-423.

50. The Administrative Procedure Act requires courts to "hold unlawful and set aside agency action . . . [performed] without observance of procedure required by law." 5 U.S.C. § 706(2)(d) (1994).

51. Munoz-Mendoza v. Pierce, 711 F.2d at 428.

52. 42 U.S.C. §§ 4321-4370(a) (1988).

53. Sierra Club v. Marsh, 872 F.2d 497, 500 (1st Cir. 1989). "[T]he harm at stake in a NEPA violation *is* a harm to the *environment*, not merely to a legalistic 'procedure'. . . . [T]he risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation." *Id.* at 504.

54. Lujan v. Defenders of Wildlife, 504 U.S. at 573 n.8 (emphasis added).

55. CEASE v. New England Aquarium, 836 F.2d at 58.

of marine mammals.[56] The court also blocked one of the few remaining avenues by which environmental groups could bring suit under the Administrative Procedures Act[57] when they have been denied information that is pertinent to the continuance of their organizational purposes.

III. SUBJECT CASE

Kama was born in captivity at Sea World in San Diego in 1981. In 1987 he was transferred to the New England Aquarium for breeding and/or public display purposes. As Kama did not fit into the social environment of the aquarium, he was not used for either purpose and the aquarium requested permission from the Secretary of Commerce to transfer Kama to the U.S. Navy. The Navy filed a similar request with the Secretary. The Secretary issued a Letter of Agreement to the Navy that set forth the obligations of the Navy to ensure Kama's safety and well-being. Kama was transferred pursuant to that Letter. Kama now resides in Hawaii, where the Navy uses him for scientific research regarding his sonar capabilities.[58]

This suit, brought by animal rights groups Citizens to End Animal Suffering and Exploitation (CEASE), the Progressive Animal Welfare Society (PAWS), and the Animal Legal Defense Fund, has focused attention on the broad issues of how and when marine mammals are taken from the wild. These groups are concerned with modifications to the permitting process[59] which allow Letters of Agreement to be issued instead of permits. These "Letters" are frequently used when animals are being transferred between facilities or when qualified institutions rescue beached or sick marine mammals.[60] The groups are mainly concerned with what happens to the animals after the transfers.[61] If the

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56. *See* H.R. CONF. REP. No. 1488, 92d Cong., 2d Sess. 9 (1972).

57. When a party seeks judicial review of agency action under the general review provision of the Administrative Procedures Act, 5 U.S.C. § 702 (1994), he must meet two requirements: (1) plaintiff must identify the agency action affecting his interests, and (2) he must demonstrate that the interest sought to be protected is within the zone of interests to be protected or regulated by the statute. Association of Data Processing Service Org., Inc. v. Camp, 397 U.S. 150, 153 (1970).

58. CEASE v. New England Aquarium, 836 F. Supp. at 46-47.

59. *See supra* note 17.

60. CEASE v. New England Aquarium, 836 F. Supp. at 47.

61. Jeff Hecht, *Suit and Countersuit Over Dolphin's Rights; Lawsuits Filed by Animal Rights Groups and New England Aquarium Against Each Other*, NEW SCIENTIST, Oct. 12, 1991, at 15.

government doesn't provide information on transfers of the animals, the plaintiffs cannot follow such incidents and determine the animals' ultimate fate.[62]

The aquarium, on the other hand, sees this suit as frivolous harassment that would undermine the aquarium's program for rescuing stranded whales and dolphins. The aquarium filed a five million dollar defamation counter-suit in an effort to fight back.[63]

Plaintiffs claimed that defendants violated the plain language of the MMPA by transporting/transferring Kama without obtaining a permit from the Secretary of Commerce.[64] Defendants contended that the statute should be viewed in an integrated manner, and as such, the permitting section of the MMPA should be found to apply only to marine mammals in the wild. Therefore, defendants claimed, a permit was not required for the transfer of a marine mammal already in captivity.[65]

Plaintiffs further alleged they were injured by the transfer of Kama as they were no longer able to observe and study him; that the transfer of Kama contributes to the depletion of wild dolphins; that the Secretary's failure to follow the permit procedures denied plaintiffs notice of the transfer, the opportunity to comment and request a hearing regarding the transfer, and the opportunity to disseminate information to their members. Plaintiffs also claimed that transferring marine mammals pursuant to Letters of Agreement is contrary to the MMPA, as it is bypassing the permit process without notifying the public. Finally, plaintiffs contended that transferring marine mammals pursuant to Letters of Agreement is a violation of the National Environmental Policy Act.[66]

The court dismissed the claim on defendants' motion for summary judgment, holding that plaintiffs did not meet the "injury in fact" prong of the test for standing as set out in *Lujan v. Defenders of Wildlife*.[67] The court held that plaintiffs had not suffered any actual harm because

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62. The 1994 Amendments to the MMPA allow transfers of animals already in captivity between facilities permitted for public display or scientific research without following the permit process. H.R. REP. NO. 439, 103d Cong., 2d Sess, at 5 (1994).

63. Fox Butterfield, *Claiming Harassment, Aquarium Sues 3 Animal Rights Groups*, N.Y. TIMES, Oct. 1, 1991, at A18.

64. 16 U.S.C. § 1372(a)(4) (1988).

65. CEASE v. New England Aquarium, 836 F. Supp. at 47-48.

66. *Id.* at 48. The National Environmental Policy Act is codified at 42 U.S.C. §§ 4321-4370 (1988).

67. *See supra* note 22.

they had not suffered procedural or informational harm.[68] The court expanded the requirements for informational harm as set forth in *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*[69] and required a plaintiff to also suffer procedural harm in order to find "injury in fact." Informational harm alone, according to this court, is insufficient to constitute injury in fact.[70]

IV. DISCUSSION

A. Plaintiffs Have Met the "Injury in Fact" Requirement

The *New England Aquarium* court states that plaintiffs have not met the injury in fact requirement of standing. The court predicates its holding on the following chain of logic: informational harm and procedural harm are inextricably intertwined; the individual plaintiffs have not suffered procedural harm; the court won't find informational harm without procedural harm; therefore, no plaintiffs (including the organizations) have suffered "injury in fact" and, thus, none have standing to sue. While this analysis may be logically sound under some circumstances, the court erred in its application to the organizational plaintiffs in this case.

The *New England Aquarium* court never analyzed whether the organizational plaintiffs had suffered procedural harm. It simply concluded that because the individual plaintiffs did not suffer procedural harm, the organizational plaintiffs could not have suffered procedural harm either. The court then determined that plaintiffs may have suffered informational harm, but that that harm alone is insufficient to confer standing because informational harm is inconsistent with the requirement of a concrete injury. What the court failed to consider, however, was that the MMPA requires the dissemination of the information and that these plaintiffs needed this information to continue their organizational purposes. Therefore, they did suffer informational harm. Because procedures required by the MMPA were not followed, plaintiffs also suffered procedural harm. Therefore, the plaintiffs in this case should have met the "injury in fact" element of standing.

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68. *See supra* note 22.

69. *See supra* note 41.

70. CEASE v. New England Aquarium, 836 F. Supp. at 57-58.

1. Informational Harm

The court in the subject case stated that "plaintiffs' desire for information cannot be said to evidence more than the organizations' and their members' 'long-standing . . . interest' in the issue of animal welfare.'"[71] The court dismisses plaintiffs' claim that their ability to achieve the organization's corporate purpose had been impaired. However, if the group purports to follow transfers, and other activities that affect animals such as Kama, they need the information necessary to do so. The court is correct that mere interest in a problem is not enough;[72] however, informational harm together with procedural harm goes beyond "mere interest." As such, the *New England Aquarium* court needed to consider the relationship between both types of alleged harm before reaching a conclusion.

The *New England Aquarium* court chose to apply the *Lyng*[73] test instead of the more liberal one outlined in *Competitive Enterprises*.[74] The court stated, "where . . . there is insufficient evidence of any other 'concrete and particularized injury' to confer, or contribute to, a finding of standing, evidence of informational harm alone is inadequate to defeat a motion for summary judgment based on lack of standing."[75] However, the *Lyng* and *Competitive Enterprise* decisions are consistent and should be applied together. The *Lyng* court merely qualified the decision reached in *Competitive Enterprises* (and did so in dicta). *Lyng* warns against suits based on informational harm alleged by plaintiffs who would *like* to have information, as opposed to plaintiffs who are *entitled* to such information under statutes that require its dissemination.[76]

Competitive Enterprises provides the applicable test regarding informational harm.[77] The plaintiffs in the *New England Aquarium* case

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71. *Id.* (*quoting* Sierra Club v. Morton, 405 U.S. 727, 739 (1972)).

72. *See* Foundation on Economic Trends v. Lyng, 943 F.2d 79, 84-85 (D.C. Cir. 1991) (*quoting* Sierra Club v. Morton, 405 U.S. 727, 739 (1972)).

73. *Id.* at 79. *See supra* notes 43-47 and accompanying text.

74. CEASE v. New England Aquarium, 836 F. Supp. at 57.

75. *Id.* at 58.

76. Animal Legal Defense Fund, Inc. v. Espy, 23 F.3d 496 (D.C. Cir. 1994), limited the holding of *Competitive Enterprise* to cases brought by concerned organizations under statutes that require dissemination of information to the public, such as NEPA and the MMPA.

77. *See supra* Section II. Competitive Enterprise Inst. v. National Highway Traffic Safety Admin., 901 F.2d at 122.

met this test. The permit information was essential to their activities because the purpose of their organization is to observe and monitor marine mammals, specifically those animals located at the New England Aquarium. By allowing the transfer of Kama without notifying the public, the Secretary rendered their activities infeasible. Plaintiffs didn't know Kama was being moved and therefore could not fulfill one of the organizations' objectives. This combination creates informational harm and constitutes injury in fact. Therefore, if the Secretary had required a permit application and had published such application, plaintiffs would have had the information they required and would not have been deprived of the opportunity to protest the issuance of the permit.

2. *Procedural Harm*

In determining that plaintiffs did not suffer procedural harm, the *New England Aquarium* court relies on two principal cases: *Defenders of Wildlife*[78] and *United States v. AVX Corp.*[79] While these cases do state that procedural harm alone is generally insufficient to establish injury in fact, they do not preclude it altogether. The Court stated in *Lujan* that an individual can enforce procedural rights so long as the procedures in question are designed to protect a threatened concrete interest of his that is the ultimate basis of his standing.[80] The Court gives several examples of when procedural harm is a valid basis for standing. One example is particularly analogous to the *New England Aquarium* case: "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement (EIS), even though he cannot establish with any certainty that the Statement will cause the license to be withheld or altered. . . ."[81] In the same sense that an EIS provides notice to neighbors of a construction site, the public notice requirements of the

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78. 504 U.S. 555 (1992). *See supra* part II.

79. 962 F.2d 108 (1st Cir. 1992). In this case, the National Wildlife Federation (NWF), an intervenor in the lower court, tried to appeal the entry of a consent decree concerning the cleanup of New Bedford Harbor, Massachusetts. The original parties to the litigation successfully contended that NWF lacked standing to appeal. NWF claimed standing on, among other grounds, procedural injury. However, the *AVX* court relied on the Eighth Circuit opinion in Defenders of Wildlife v. Lujan, 911 F.2d 117 (8th Cir. 1990), *rev'd*, 504 U.S. 555 (1992).

80. Defenders of Wildlife v. Lujan, 504 U.S. at 573 n.8.

81. *Id.* at 572 n.7.

MMPA provide information to individuals and organizations whose purpose is protection and preservation of marine mammals.

B. Congressional Intent

The *New England Aquarium* court's holding fails to give sufficient weight to the public notice requirements of the MMPA. In *Committee for Humane Legislation, Inc. v. Richardson*,[82] an early case interpreting the MMPA, the D.C. Circuit stated that the basic purpose for enactment of the MMPA was to provide marine mammals, *especially porpoise*, with necessary and extensive protection against man's activities.[83] One means of protecting these mammals is via public participation in the decision-making process. Environmental groups, and particularly animal rights groups, constitute a significant portion of the "interested public." A recent commentator noted, "[t]he environmental community is generally an open one that is accustomed to demanding public participation in decision making and to relying on public access to government information. Environmental nongovernmental organizations consider that they have an essential role in keeping governments accountable for their environmental protection practices."[84]

The MMPA embodies this belief in section 1374(d)(2),[85] where Congress instructs the Secretary to publish notice of permit applications. The legislative history of the MMPA makes this point even more clearly: "[t]he public is invited and encouraged to participate fully in the agency decision-making process. The agencies are further required to provide full information to interested members of the public on what the implications of the program and of any proposed agency actions may be."[86] Clearly, Congress was thinking of plaintiffs such as the organizational plaintiffs in the *New England Aquarium* case when making the foregoing statement.

Unfortunately, the *New England Aquarium* court did not analyze the situation as thoroughly as it should have. After granting defendants'

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82. Plaintiffs, an animal rights group, challenged a NMFS permit which allowed purse-seine fishing for yellowfin tuna "on porpoise." Committee for Humane Legislation, Inc. v. Richardson, 540 F.2d. 1141 (D.C. Cir. 1976).

83. *Id.* at 1148.

84. Edith Brown Weiss, *Environment and Trade as Partners in Sustainable Development: A Commentary*, 86 AM. J. INT'L L. 728, 734-735 (1992).

85. 16 U.S.C. § 1374(d)(2) (1972).

86. H.R. CONF. REP. NO. 1488, 92nd Cong., 2d Sess. (1972).

motion for summary judgment, the court gives several recommendations to plaintiffs as to how they may better achieve their purposes.[87] The court first suggests plaintiffs resort to the Freedom of Information Act (FOIA).[88] The FOIA allows the public to request and receive information regarding agency actions. The MMPA was enacted after the FOIA, and Congress explicitly inserted public notification requirements in the MMPA. Resort to other Acts apparently was not within Congress' intentions and therefore should not be necessary. Besides defeating Congress' intent, forcing plaintiffs to resort to such an unnecessary means of obtaining information is a waste of public resources.

The court also suggests that plaintiffs participate in the political process and lobby for Congressional amendments or interpretations of the MMPA provisions in question. While this is an interesting suggestion, it provides more of a long term solution rather than resolution of the immediate question;[89] the political wheels move slowly. Furthermore, plaintiffs should not have to lobby for an interpretation of a statute which is plain on its face; in both the MMPA and its legislative history Congress clearly stated that takings of marine mammals require permits, and permit applications must be published. As Congress had not yet spoken differently on this issue,[90] plaintiffs should not have been thrown out of court.

V. CONCLUSION

It is clear from the legislative history that Congress fully intended the public to be informed of any agency action under the MMPA. The MMPA requires that an interested party have the ability to comment on

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87. CEASE v.,New England Aquarium, 836 F. Supp. at 59.

88. The Freedom of Information Act of 1966, 5 U.S.C. § 552 (1994).

89. If plaintiffs resorted to the political process, Kama could well be dead before they see results. The average lifespan of a dolphin is 30 years. Eric Gamalinda, *Philippines: Tuna Canneries Pressured to Stop Dolphin Deaths*, Inter Press Service Global Information Network, Dec. 22, 1992, *available in* Westlaw, Magsplus Database, 1992 WL 2481396.

90. Although the 1994 Amendments to the Marine Mammal Protection Act show Congress' apparent change of mind on this issue (*see* H.R. REP. NO. 439, *supra* note 63), they do not necessarily change the effect of the law in this case. Plaintiffs would no longer have a cause of action to bring suit; however, it is possible that plaintiffs in a similar situation involving a marine mammal in the wild would still be unable to show the requisite harm.

or protest a permit. That ability can only be exercised if the Secretary fulfills his duty under the MMPA and publishes the fact that someone applied for a permit. When those facts are not published, organizational plaintiffs such as the ones in the *New England Aquarium* case clearly suffer informational harm, as well as procedural harm.

The court's holding is another step in the disturbing trend towards summarily rejecting claims made by environmental plaintiffs under the MMPA and similar statutes.[91] This decision places an additional burden on environmental plaintiffs that is neither supported nor suggested by prior case law. Such a burden effectively closes the door to organizational plaintiffs in a manner contrary to the express intent of Congress under the MMPA. If these groups, whose very purpose is to gather and disseminate information regarding marine mammals, cannot sue to protect their right to do so, who can?

91. There has been extensive litigation under similar provisions in the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (1988), and the Endangered Species Act, 16 U.S.C. § 1531 (1988).